PILBA TRADING & AGENCY

v.

SOUTH EAST ASIA INSURANCE BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[CIVIL APPEAL NO: 11-02-97-II]
19 AUGUST 1997

INSURANCE: *Motor insurance - Claims - Repair works on vehicle delayed thereby depriving plaintiff of use of vehicle - Whether insurance company guilty of negligence - Whether damage suffered by plaintiff because of negligence of insurance company - Whether insurance company liable for such claims*

TORT: *Negligence - Pure economic loss - Whether claim for pure economic loss can be entertained in action for negligence*

TORT: *Negligence - Proof of negligence - What must be proved - Repair works on vehicle delayed thereby depriving plaintiff of use of vehicle - Whether insurance company guilty of negligence - Whether damage suffered by plaintiff because of negligence of insurance company*

CIVIL PROCEDURE: *Parties - Company - Action grounded on negligence brought against company and manager of company - Whether manager may be made a party - Whether manager vicariously liable - Whether company can only be sued in its own name and not through its employee*

The appellant's motor car was covered by a policy of insurance issued by the first respondents. The second respondent was a branch manager of the first respondent. As a result of the vehicle being involved in an accident, it was sent to the first respondent's corporate workshop. The repairs took 59 days to be completed, during which time the appellant was deprived of the use of the vehicle. The appellant used the services of a taxi to get about its work. It alleged that the long delay in repairing the vehicle was caused by the negligence of the respondents or its agents and thus brought a claim for special damages incurred by way of taxi fares and telephone calls. The Sessions Court dismissed the appellant's claim and hence this appeal.

The pertinent facts leading to this appeal were as follows. The workshop where the appellant sent its vehicle for repairs had a business arrangement with the first respondent giving the workshop the privilege of repairing insured vehicles without the need for an approval letter or authorisation from the first respondent. Repairs began immediately but the workshop tendered its

quotation for the replacement of a whole gearbox assembly without giving the breakdown of items. The breakdown figures were necessary to enable the adjusters to adjust the claim. A fresh quotation was sent to the second respondent one month later as a result of which the adjuster could prepare and submit his report. It was in evidence that the adjuster needed a cogent reason to allow the gearbox assembly to be replaced because it was rare for a gearbox assembly to be damaged.

The main thrust of the appellant's contention in this appeal was that under the principles of *Donoghue v. Stevenson*, the respondents owed a duty of care to the appellant and they were responsible for the economic loss that the appellant had suffered. The respondents, on the other hand, denied that they owed a duty of care and that they were responsible. They also contended that the principles of *Donoghue v. Stevenson* had no application in the instant case as there was no physical damage suffered and that those principles did not apply to a pure economic loss.

Held:

[1] In the instant case, the loss was alleged economic loss which includes the expenses incurred by the appellant in hiring alternative transport while the vehicle was still in the workshop. It was a financial or pecuniary loss which did not involve any physical damage or the danger of physical damage to the property of the appellant. It was a case concerning pure economic loss. It is quite distinct from cases of economic loss involving physical damage. If the respondents had physically damaged the appellant's car, any financial loss suffered by the appellant flowing from the physical damage may be claimed against the respondents. Because the loss in this case was purely economic, being unable to rely on physical damage, the established legal position in regard to this is to preclude such claims even where foreseeable.

[2] To institute the right of action for negligence, three elements must be proved, they being, (i) there is a duty on the part of the plaintiff towards the defendant; (ii) the defendant negligently performs or omits to perform its duty; and (iii) the negligence is the effective cause of injury or damage to the defendant.

[3] In the instant case, the repairs to the appellant's vehicle were carried out even before the formal approval was received by the workshop. Based on the evidence, the appellant was unable to prove that the respondents had a duty toward the appellant in this matter. It had also failed to prove that the respondents had neglected or omitted to carry out their duties. Further, the appellant had failed to adduce evidence to prove damage suffered by them as a result of the negligent act or omission of the respondents.

[4] It was not correct to bring a claim against the second respondent as he was not a party to the cause of action. As the action was grounded on negligence, the second respondent cannot be said to be a tortfeasor in the action. He was a branch manager of the first respondent and there was no evidence to show that it was him who gave approval or authorisation to repair the car on behalf of the first respondent and therefore that his action or omission caused the delay in the repair of the vehicle. He could not be vicariously liable. Moreover, the action was against the company, the first respondent, and the appellant was alleging that the company committed a tort of negligence against it. The company can be sued only in its own name and not through its employee bearing in mind that he was not a tortfeasor.

[Appeal dismissed with costs.]

Case(s) referred to:

Aron Salomon (Pauper) v. A. Salomon & Co Ltd [1847] AC 22 ***(refd)***
Anns v. Merton London Borough Council [1978] AC 728 ***(refd)***
Caparo Industries Plc v. Dickman & Ors [1990] 1 All ER 568 ***(refd)***
D & F Estates Ltd & Ors v. Church Commissioners for England & Ors [1989] AC 177 ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Enderby Town Football Club Ltd v. Football Association Ltd [1971] Ch 541 ***(refd)***
Fender v. St John-Mildmay [1938] AC 1 ***(refd)***
Greater Nottingham Co-operative v. Cementation Ltd [1989] 1 QB 95 ***(refd)***
Hedley Byrne & Co Ltd v. Heller & Partners Ltd [l964] AC 465 ***(refd)***
Hussaina Rani Mohamed v. Ahmad Nadzri Kamarudin & Anor [1997] 3 CLJ 500 ***(refd)***
Junior Books Ltd v. Veitchi Co Ltd [1983] 1 AC 520 ***(refd)***
Leigh & Sullivan Ltd v. Aliakman Shipping Co Ltd [1986] AC 785 ***(refd)***
Mcloughlin v. O'Brian [1983] 1 AC 410 ***(refd)***
Muirhead Industrial Tank Specilists [1986] QB 507 ***(refd)***
Murphy v. Brentwood District Council [1990] 2 All ER 908 ***(refd)***
Ogwo v. Taylor [1987] 3 WLR 1145 ***(refd)***
Richardson v. Mellish [1824] 2 BING 229 ***(refd)***
Rouff v. Long [1916] 1 KB 148 ***(refd)***
The Wagon Mound (No 2) [1967] 1 AC 617 ***(refd)***
Yuen Yun Yeu v. Attorney General of Hong Kong [1987] 3 WLR 776 ***(refd)***

Other souce(s) referred to:

Halsbury's Laws of England, 4th edn, vol 34, para 6 p. 9

For the appellant - RJ Noel; M/s RJ Noel Advocs
For the respondents - Roland Thomas; M/s Battenberg & Talma Advocs

Reported by S Dharmendran

JUDGMENT

Muhammad Kamil Awang J:

The appellant took its damaged motor car (the said vehicle) on 12 March 1993 for repair at Tan Chong Express (ie, a corporate workshop) appointed by the respondents. At the material time the said vehicle was covered by a policy of insurance no. 002129667/0101 dated 11 December 1992, issued at Kuching, by the 1st respondent.

There was no dispute about this.

The repairs were carried out by a corporate workshop to the satisfaction of the appellant. There was no dispute about this. However the repairs took about 59 days from the time the said vehicle was sent to the workshop. There is no doubt the appellant was deprived of the use of the said vehicle for the duration of the said vehicle in the workshop, and it used the services of a taxi to get about its work. It alleged that the long delay was caused by the negligence of the respondents or agent and thus brought a claim against the respondents for special damages, *ie*, the amount of RM4,327.65 which was incurred by the appellant in taxi fares and telephone calls. The appellant's claim was dismissed with costs by the Sessions Court and hence this appeal.

The main thrust of the appellant's contention in the appeal is that under the principles of *Donoghue v. Stevenson* [1932] AC 562 HC (SC) the respondents owed a duty of care to the appellant and they were responsible for the economic loss that the appellant had suffered. The respondents denied that they owed a duty of care and that they were responsible; and they contended that the principles of *Donoghue v. Stevenson* have no application in the case as there was no physical damage suffered; the principles do not apply to a pure economic loss. In support the respondents cited the following authorities: *Junior Books Ltd v. Veitchi Co Ltd* [1983] 1 AC 520; *Muirhead Industrial Tank Specialists* [1986] QB 507 (CA); *D & F Estates Ltd v. Church Commissioners For England* [1989] AC 177 HL; *Greater Nottingham Co-operative v. Cementation Ltd* [1989] 1 QB 95; and *Caparo Industries Plc v. Dickman & Ors* [1990] 1 All ER 568 HL.

The facts of *Donoghue v. Stevenson* are well known. Mrs Donoghue suffered damage as a result of drinking part of a bottle of ginger-beer in which a decomposing snail was found. She had drunk the ginger-beer in a cafe but she was not the purchaser. She began an action against the manufacturer of the ginger-beer, Stevenson. The case reached the House of Lords on a preliminary issue of whether any duty was owed by the manufacturer, Stevenson, to the consumer of his products. Lord Atkin, who gave the leading judgment, made two statements which are potential *rationes decidendi*:

> A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in a form in which they left him with no reasonable possibility of intermediate inspection owes a duty to the consumer to take reasonable care; and
>
> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or omissions which are called in question.

Principle (a) is known as the narrow ratio and subsequent cases have applied and extended it in a variety of ways. 'Manufacturer' has been extended to retailers, repairers of goods and suppliers of drinking water. 'Products' has been held to include not just food and drinks but cars, houses, hair dye and underwear. The 'ultimate consumer' has been extended to cover a bystander injured by a defective product.

Principle (b), the neighbour principles, has been directly applied in cases too numerous to mention. In *Ogwo v. Taylor* [1987] 3 WLR 1145 the facts were as follows: A man, who was using a blow lamp to strip paint, negligently set fire to his house. A fireman attending the blaze was seriously injured. The House of Lords held that the fireman was a person so closely or directly affected by the defendant's action that he ought reasonably to have him in contemplation.

In *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575, HL (E), the House was of the opinion that the principles stated in *Donoghue v. Stevenson* was too wide. Another pre-requirement before a duty of care could be established as existing and flowing from the tortfeasor to the plaintiff is that there should be a relation of proximity between the plaintiff and the defendant. The meaning of proximity was extended from mere physical nearness to other circumstances including where the plaintiff had depended on the defendant to carry out a task and when the defendant could have reasonably expected to know of this dependence.

The creation of new duty situations to the neighbour principle itself was reformulated in a two-stage test in *Anns v. Merton London Borough Council* [1978] AC 728. One has to ask whether:

(i) As between the alleged wrong doer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on

his part may likely cause damage to the latter – in which case a *prima facie* duty of care arises; and

(ii) if the first question is in the affirmative, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damage to which a breach of it may give rise (per Lord Wilberforce).

This version of the principle led to 'policy-based' decisions to extend it to wholly new forms of loss or damage. For example there were areas of liability for nervous shock *(Mcloughlin v. O'Brian* [1983] 1 AC 410) and economic loss *(Junior Books Ltd v. Veitchi Co Ltd [1983] 1 AC 520).*

By mid 1980s, the House of Lords began to turn against the *Anns* principle. In *Leigh & Sullivan Ltd v. Aliakman Shipping Co Ltd* [1986] AC 785, Lord Brandon of Oakbrook said:

> ... that passage (in *Anns*) does not provide, and cannot in my view have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of a duty of care in the law of negligence.

In *Yuen Yun Yeu v. Attorney General of Hong Kong* [1987] 3 WLR 776, a PC case where Lord Keith of Kinkel significantly restated the narrow ratio of *Donoghue v. Stevenson* and attacked the *Anns* test. He denied that foreseability of harm is the only criterion for a creation of a sufficient relationship of proximity or neighbourhood:

> Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning.

Lord Keith's conclusion was this:

> In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in *Anns* is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

Lord Brandon succinctly states the current position in *Junior Books v. Veitchi* [1983] *(supra)* in *Donoghue v. Stevenson* itself and in all numerous cases in which the principles of that decision has been applied to different but analogous factual situations, it has always been either stated expressly, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or that the threat of danger, of physical damage to persons or their property ... .

The House of Lords in *Murphy v. Brentwood District Council* [1990] 2 All ER 908, the seven-men court described the decision as 'unsatisfactory', 'not proceeding on any basis of principle at all' and it was overruled along a number of dependent decisions. Other important decisions, notably *Junior Books Ltd v. Veithchi Co. Ltd (supra)* were 'confined to its facts'.

In *Caparo Industries Plc v. Dickman & Ors* [1990] *(supra)* Lord Oliver, after studying a line of authorities stated at p. 584:

> ... it is clear from a series of decisions in this house, at least so far as concerns the law of the UK, the duty of care in tort depends not solely on the existence of the essential ingredient of foreseability of damage to the plaintiff but on its coincidence with a further ingredient to which has been attached the label 'proximity' which was described by Lord Atkin in the course of his speech in *Donoghue v. Stevenson* ([1932] AC 562 at page 581) as such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

Further, at p. 585 Lord Oliver states:

> Thus the postulate of a simple duty of care to avoid harm, that is, with hindsight, reasonably capable of being foreseen, becomes intenable without the imposition of some intelligible limits to keep the law of negligence within bound of common sense and practicability. These limits have been found by the requirement of what is called a 'relationship of proximity' between the plaintiff and the defendants and by the imposition of a further requirement that the attachment of liability from harm which has occurred to be just and reasonable'.

The new approach is best summarised in their Lordships' most favoured passage, cited with such regularity that it must indicate the future lines of development.

"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than a massive extension of *prima facie* duty of care restrained only by indefinable consideration which ought to negative, or reduce, or limit the scope of duty or the class of person to whom it is owed." *Sutherland Shire Council v. Heyman* [1985] 59 ALJR 564 at p. 588 per Brennan J.

More precisely, in the instant case, this loss is alleged economic loss which includes the expenses incurred by the appellant in hiring alternative transport while the vehicle was still in the workshop. It is a financial or pecuniary loss and does not involve any physical damage or the danger of physical damage to the property of the appellant. It is a case concerning pure economic loss. It is quite distinct from cases of economic loss involving physical damage.

If the respondents had, instead, physically damaged the appellant's car then any financial loss suffered by the appellant flowing from the physical damage, may be claimed against the respondents. Because the loss in this case is purely economic, being unable to rely on physical damage, the established legal position in regard to this is to preclude such claims even where foreseeable. **"... the Courts have always been reluctant to extend the law of negligence to claims of foreseeable economic loss;"** *Halsbury's Laws of England*, 4th edn. vol. 34, para. 6 p. 9.

As we have seen, in *Muirhead v. Industrial Tank Specialist* [1986] *(supra)* and *D & F Estates Ltd v. Church Commissioners For England* [1989], a CA case and a HL case respectively, which are two of the many cases that have expressed their approval as to the position of the law put forward by Lord Brandon.

> ... the commonest reason given for excluding such (economic loss) claims from the ambit of the duty of care is the possibility of indeterminate liability." See Textbook on Tort, Michael A. Jones, page 91.

In a Court of Appeal case of *Greater Nottingham Co-operative v. Cementation Ltd* [1989] *(supra)*, Lord Purchas states:

> ... If one is to extend the concept of *Donoghue v. Stevenson* duty beyond the occurrence of, or the danger of, physical damage then it should only be done as a matter of policy in special cases ...

Learned counsel, Mr. Noel, urged the court to extend the public policy to such a case as this in order to do justice to the common man on the Kuching omnibus. He said that there are numerous cases in the country, where the insurance company get away with impunity on the ground of contractual promises. With respect, in my judgment there must be a limitation on the extent to which a court will enforce contractual promises. Despite the freedom of contract there is still a residuary power to strike down contract as contrary to public policy. What is public policy? His Lordship, Borough J in *Richardson v. Mellish* [1824] 2 BING 229 said:

> ... public policy is a very unruly horse, and when once you get astride if you never know where it will carty you ...

"I disagree," said Lord Denning MR in *Enderby Town Football Club Ltd v. Football Association Ltd* [1971] Ch 541. "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice.

It has been said since 1937 in *Fender v. St John-Mildmay* [1938] AC 1 "the heads" of a public policy are closed. Parliament is a better forum in which to determine public policy since its members are democratically elected. But it is likely that judicial activism is not dead. Nevertheless, I would not venture to open "the heads" of public policy, as in this case, which seems to me to be a frolic outside the domain of this court.

Learned counsel, Mr. Roland Thomas, urged the court to consider the floodgates argument often explained by the current established cases as an important reason to restrict pure economic loss claims where it may be strictly logical to allow a claim. As Lord Justice Purchas in the Greater Nottingham case, puts it:

> ... there is no precedent for the application of strict logic in treading the path leading from basic principle established in *Donoghue v. Stevenson* towards the Pandora's Box of unbridled damages at the end of the path of foreseeability. That this is a field in which the law has properly applied policy restrictions is justified by a glance at the position reached on the other side of the Atlantic where damages awarded in respect of medical and surgical negligence is, it is believed, affecting the proper execution and others of their professional tasks to the detriment of their patients.

To institute the right of action for negligence, three elements must be proved -

(a) there is a duty on the part of the plaintiff towards the defendant;

(b) the defendant negligently performs or omits to perform its duty; and

(c) the negligence is the effective cause of injury or damage to the defendant.

The onus of proving that the result of negligence is the effective cause of injury is upon the plaintiff: see *Rouff v. Long* [1916] 1 KB 148, 152; and *Hussaina Rani Mohamed v. Ahmad Nadzri Kamarudin & Anor* [1997] 3 CLJ 500, CA The defendant is responsible for the consequences which he could foresee or reasonably be expected to foresee as the natural result of his negligent act or omission. See *The Wagon Mound* [1961] AC 388 and *The Wagon Mound (No. 2)* [1967] 1 AC 617.

Mr Thomas submitted that the relationship between the appellant and the 1st respondent is by way of an insurance policy (exh. D26), the appellant is the insured owner of the vehicle and the 1st respondent is the insurer. The obligations or duties of the insurer are a contractual one that is to indemnify the insured against loss or damage to the appellant's vehicle, and should exclude further tortuous claim. The appellant has not shown or adduced evidence to show that their duties extend beyond the insurance policy. The respondent's duties are to indemnify the appellant as per the insurance policy.

DW2 and DW4, officers of the 1st respondent, in their testimonies explained that the workshop where the appellant sent its vehicle for repairs, had a business arrangement with the 1st respondent, giving the workshop the privilege of repairing insured cars or vehicles without the need for an approval letter or authorization from the 1st respondent.

On the facts, the appellant's vehicle was brought to the workshop on 12 March 1993, and the respondent received the Motor Accident Report Form (exh. D1) On 18 March 1993.

The 1st respondent had sent on the same date its in-house adjuster surveyor, DW1, to process the claim. However the workshop tendered its quotation (exh. D2) for the replacement of a whole gearbox assembly without giving the breakdown of items. The breakdown figures are necessary to enable the adjusters to adjust the claim. A fresh quotation (exh. D3) was sent to the 2nd respondent a month later, *ie*, 6 April 1993.

The adjuster's report (exh. D12) was prepared by DW1 and was sent to the 1st respondent *via* inter-office memorandum dated 4 May 1993 (exh. D12). It is clear that the adjuster could prepare and submit his report after the workshop had submitted sufficient details on the damage.

DW1, DW2 and DW4 in their evidence confirmed that repairs to any insured vehicles referred by the respondent to the workshop can be done as quickly as possible, as soon as the in-house adjuster has seen the vehicle. This is to facilitate a quick repair to be done without undue delay. As a matter of fact, in this case the repairs to the appellant's vehicle were carried out even before the formal approval was received by the workshop.

PW4 testified that the possibility of replacing only the damaged parts would take a long time as the parts were not available at hand and had to be ordered from Japan. The workshop took more than one month to prepare the details of the breakdown parts to be replaced. DW4 said that the in-house adjuster needed a cogent reason to allow the gearbox assembly to be replaced because it was rare that a gearbox assembly was damaged.

It is clear that the appellant was unable or failed to prove that the respondents have a duty toward the appellant in this matter. It has also failed to prove that the respondents had neglected or omitted to carry out their duties.

The appellant has failed to adduce evidence to prove damage suffered by them as a result of the negligent act or omission of the respondents.

Further, Mr Thomas submitted that the appellant's claim for loss of business, goodwill and opportunity to visit business clients must fail for two reasons. Firstly, the said vehicle was insured only for private use and not for business and commercial use. The manager of the appellant used the said vehicle to do business and to transport products or gold to the appellant's clients. The insurance (exh. D5) clearly states that the policy does not cover the carriage of goods. Therefore, the policy is voidable for non-disclosure of the purpose of the insured vehicle.

Secondly, the appellant cannot be heard to say that there had been loss of business or being inconvenienced by not having the said vehicle. There was alternative transport, eg, the taxis, which the appellant had used to carry on its business.

Another matter need be mentioned here is that it is not correct to bring a claim against the 2nd respondent as he is not a party to the cause of action. As the action is grounded on negligence, the 2nd respondent cannot be said to be a tortfeasor in the action. He is a branch manager of the 1st respondent, and there is no evidence to show that he gives approval or authorisation to repair the car on behalf of the 1st respondent, and therefore that his action or omission caused the delay in the repair of the vehicle. He cannot be vicariously liable.

Moreover the action is against the company, the 1st respondent, and the appellant is alleging that the company committed a tort of negligence against it. The company can be sued only in its own name, and not through its employee bearing in mind that he is not a tortfeasor. The company is a separate legal entity from its employees: *Aron Salomon (Pauper) v. Salomon & Co. Ltd* [1847] AC 22.

On the totality of evidence and in the circumstances of the case, the appellant has failed to prove its case, and I would dismiss the appeal with costs.